

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE  
AT KNOXVILLE

Assigned on Briefs May 22, 2007

**JOHNATHON BAUDER v. STATE OF TENNESSEE**

**Direct Appeal from the Criminal Court for Bradley County**  
**No. 05-427     Amy A. Reedy, Judge**

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**No. E2006-02171-CCA-MR3-PC - Filed July 11, 2007**

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The petitioner, Johnathon Bauder, pled guilty to two counts of rape of a child, Class A felonies, and was sentenced as an especially mitigated offender to an effective sentence of thirteen and a half years to be served at 100%.<sup>1</sup> He filed a petition for post-conviction relief, arguing that his guilty pleas were not knowingly and voluntarily entered and that he received the ineffective assistance of counsel. After a hearing, the post-conviction court dismissed his petition. Following our review, we affirm the post-conviction court's order of dismissal.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed**

ALAN E. GLENN, J., delivered the opinion of the court, in which JAMES CURWOOD WITT, JR. and JOHN EVERETT WILLIAMS, JJ., joined.

Douglas N. Blackwell, II, Cleveland, Tennessee, for the appellant, Johnathon Bauder.

Robert E. Cooper, Jr., Attorney General and Reporter; Cameron L. Hyder, Assistant Attorney General; Steve Bebb, District Attorney General; and John O. Williams, Assistant District Attorney General, for the appellee, State of Tennessee.

**OPINION**

**FACTS**

At the petitioner's submission hearing, the State set out that the proof against him would have established that he had anally and orally penetrated the minor victim named in his indictment. More specifically, the victim had disclosed the offenses himself and was prepared to testify against the petitioner had the matter gone to trial. In addition, the petitioner had given an inculpatory statement

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<sup>1</sup>The details of the petitioner's sentence as to each offense are not contained in the record on appeal.

to the police that, according to counsel, would “at least” lead to a conviction for aggravated sexual battery.

When questioned by the trial court about his decision to plead guilty, the petitioner testified that he understood he had the right to a jury trial, that he had discussed the plea agreement with trial counsel, and that he had no complaint about counsel’s services. He affirmed that he understood the sentence he would receive if he pled guilty and said that no one had threatened, harassed or coerced him into doing so. Trial counsel said that a mental evaluation of the petitioner had been conducted, indicating that he was competent to stand trial but was “in the lower range of intelligence.”

The trial court accepted the petitioner’s guilty pleas and, due to his low intelligence and the fact that he was nineteen years old, sentenced him as an especially mitigated offender to thirteen and a half years to be served at 100% in a “special needs” facility.

The petitioner filed a timely petition for post-conviction relief, asserting that trial counsel was ineffective for numerous reasons and that his plea was not voluntarily entered because he did not understand its nature or consequences.

The post-conviction court held an evidentiary hearing at which the petitioner testified that he did not read and write well, had not graduated from high school, had previously received psychological treatment, and had a low “IQ.” He said that trial counsel met with him twice before he entered his guilty pleas. At their first meeting, which lasted “about ten minutes, give or take a little bit,” they discussed the charges against him and potential sentences. At their second meeting, which lasted “about ten or fifteen minutes also,” trial counsel told him that his chances were not good if he went to trial, but they did not discuss a trial strategy or the testimony of potential witnesses. He also testified that he was only doing what trial counsel told him to do when he pled guilty and that he did so because his attorney was “a higher authority.”

Jessica Elliot testified the petitioner is her son’s father and said she did not participate in, but knew about, his meetings with trial counsel. Asked if the petitioner’s testimony that the meetings only lasted ten minutes was correct, Elliot said, “Yes, that sounds about right.” She also stated that she met with trial counsel twice and that the petitioner had a difficult time contacting trial counsel. On cross-examination, she acknowledged that as she was not with the petitioner at all times and that he could have met with trial counsel on other occasions.

Trial counsel testified that in his twenty-three years of legal practice, he had practiced privately, worked as an assistant district attorney for “seven or eight years,” as a criminal defense attorney, and had represented “[f]orty or fifty” defendants on rape of a child charges. He said he first met with the petitioner in general sessions court and decided to waive a preliminary hearing after interviewing a detective and receiving a copy of the petitioner’s “confession.” Prior to waiving the preliminary hearing, trial counsel “took a lot of time” to discuss the matter with the petitioner because he “knew he had some limited mental capacity.”

After a mental evaluation was conducted of the petitioner at trial counsel's request, he was found competent to stand trial, but an intellectual functioning test revealed that he "was borderline to low average range of intelligence." Trial counsel testified that petitioner's testimony that they only met twice was not accurate and that his notes reflected they had met in court and separately when the petitioner was in custody.

Trial counsel stated that during their meetings, he discussed the word "penetration" with the petitioner at length and even "went so far as to make a drawing" to ensure the petitioner understood. In addition, they discussed the statement the petitioner had given to the police, and trial counsel subsequently filed a motion to suppress that statement. However, the motion was never heard by the trial court because the petitioner accepted the State's offer of thirteen and a half years in exchange for his guilty pleas.

Trial counsel testified that he discussed the plea offer with the petitioner who understood "everything in the plea," including that he would serve his thirteen-and-a-half-year sentence at 100% and that if he went to trial, he could get as much as twenty-five years. Counsel said that he filed motions for a bill of particulars and to compel discovery and that it would have been difficult for the petitioner to overcome his confession.

At the close of the hearing, the post-conviction court denied the petition for post-conviction relief, ruling that the petitioner had received the effective assistance of counsel and entered his pleas knowingly and intelligently. Specifically, the court stated that the transcript of the submission hearing showed that there was "a very thorough" discussion among the trial court, the State, the petitioner, and trial counsel. Additionally, the post-conviction court found that the amount of time trial counsel spent with the petitioner was not a conclusive assessment of how effective his representation was:

Sometimes defendants think that they are the best avenue for information for a lawyer to represent them. They are not the only avenue that a lawyer has to gather information and to defend him. Sometimes working with [detectives], trying to talk to other witnesses, filing and doing legal research to file motions to suppress, those are things that take time and hours and are involved in the representation in your case and it appears to me that [trial counsel] did everything he should have done and could do to see that [the petitioner was] treated mercifully in the criminal justice [system], and in fact especially when there is a confession it appears that the best thing he could have hoped for was an aggravated sexual battery, and that was discussed in the plea agreement, that his confession was a strong aggravated sexual battery at the very least.

Regarding the petitioner's limited intelligence, the post-conviction court found that "he did enter this plea knowingly and intelligently even though he does have a very low IQ." Further, the post-conviction court noted that the trial court showed the petitioner adequate attention and that trial counsel had represented the petitioner zealously:

It's clear to me that the [trial court] recognized that this was someone that needed special attention and the [trial court] on the day that he ple[d] guilty took special attention and even made note in this plea hearing that "sometimes you have to temper justice with mercy once in awhile." So it was clear to [the trial court] at that brief hearing that this was someone that needed some mercy and he was glad that [the petitioner] was getting mercy. It's clear to me after listening to [trial counsel] testify that he also felt like [the petitioner] was somebody that needed mercy, special attention, and it appears that he gave him more than adequate attention in representing him, filing a motion to suppress, and waiving preliminary hearings. There are good reasons why preliminary hearings in cases like this get waived so that [the petitioner was] not exposed to ridicule, facts that might come out that would expose him to ridicule to the public and to people that he might be living with for whatever period of time in the back, so it seems to me that [trial counsel] was representing him very zealously.

### ANALYSIS

On appeal, the petitioner raises the interrelated issues of whether the post-conviction court erred in finding that he received the effective assistance of trial counsel and that his guilty plea was knowing and voluntary.

The post-conviction petitioner bears the burden of proving his allegations of fact by clear and convincing evidence, Tenn. Code Ann. § 40-30-110(f) (2003), and when an evidentiary hearing is held, the post-conviction court's factual findings are conclusive on appeal unless the evidence preponderates against them. See Tidwell v. State, 922 S.W.2d 497, 500 (Tenn. 1996). Where appellate review involves purely factual issues, the appellate court should not reweigh or reevaluate the evidence. See Henley v. State, 960 S.W.2d 572, 578 (Tenn. 1997). However, review of a trial court's application of the law to the facts of the case is *de novo*, with no presumption of correctness. See Ruff v. State, 978 S.W.2d 95, 96 (Tenn. 1998). In addition, the issue of ineffective assistance of counsel, which presents mixed questions of fact and law, is reviewed *de novo*, with a presumption of correctness given only to the post-conviction court's findings of fact. See Fields v. State, 40 S.W.3d 450, 458 (Tenn. 2001); Burns v. State, 6 S.W.3d 453, 461 (Tenn. 1999).

To establish a claim of ineffective assistance of counsel, the petitioner has the burden to show both that trial counsel's performance was deficient and that counsel's deficient performance prejudiced the outcome of the proceeding. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984). The Strickland standard is a two-pronged test:

First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the

defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Strickland, 466 U.S. at 687, 104 S. Ct. at 2064; see also State v. Taylor, 968 S.W.2d 900, 905 (Tenn. Crim. App. 1997) (noting that same standard for determining ineffective assistance of counsel that is applied in federal cases also applies in Tennessee).

The deficient performance prong of the test is satisfied by showing that "counsel's acts or omissions were so serious as to fall below an objective standard of reasonableness under prevailing professional norms." Goad v. State, 938 S.W.2d 363, 369 (Tenn. 1996) (citing Strickland, 466 U.S. at 688, 104 S. Ct. at 2065; Baxter v. Rose, 523 S.W.2d 930, 936 (Tenn. 1975)). The prejudice prong of the test is satisfied by showing a reasonable probability, i.e., a "probability sufficient to undermine confidence in the outcome," that "but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 694, 104 S. Ct. at 2068. In the context of a guilty plea, the petitioner must show a reasonable probability that were it not for the deficiencies in counsel's representation, he would not have pled guilty, but would instead have insisted on proceeding to trial. Hill v. Lockart, 474 U.S. 52, 59, 106 S. Ct. 366, 370 (1985); House v. State, 44 S.W.3d 508, 516 (Tenn. 2001).

In support of his ineffective assistance of counsel claim, the petitioner argues that according to his testimony at the evidentiary hearing, trial counsel failed to "discuss trial strategies, determine which witnesses could assist [p]etitioner in facing the charges, [or] discuss persons that should be interviewed." Additionally, the petitioner argues that trial counsel "owed a duty to [p]etitioner to at least argue the motion [to suppress] before reaching any sort of plea agreement." The petitioner asserts that trial counsel was constitutionally ineffective as a result:

Based upon the actions and inactions of [trial counsel] as set forth herein and in the original Post Conviction relief Petition and the Amended Post Conviction Relief Petition, it is evident [the petitioner] did not receive his constitutionally guaranteed right to effective assistance of counsel. Therefore, and based upon the defective assistance of counsel and his youth, mental history and low IQ, [the petitioner's] Petition for Post Conviction Relief should have been granted and [the post-conviction court] erred in denying such relief.

We disagree. The evidence presented below does not preponderate against the post-conviction court's finding that trial counsel provided the petitioner with zealous and competent legal representation. The petitioner has not carried his burden of showing that trial counsel's representation was deficient or prejudicial. Rather, the testimony of trial counsel, which was accredited by the post-conviction court, was that the petitioner received a favorable plea offer from the State and knowingly, intelligently, and voluntarily decided to accept that agreement in light of the fact that he had provided a heavily inculpatory statement to the police.

### **CONCLUSION**

Based on the foregoing authorities and reasoning, we affirm the post-conviction court's order of dismissal.

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ALAN E. GLENN, JUDGE